FILE COPY

No. 709

IN THE

Supreme Court of the United States

October Term, 1942

VIRGINIA ELECTRIC AND POWER COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD.

Petition for Writ of Certiorari
To the United States Circuit Court of Appeals
For the Fourth Circuit

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Petition for Writ of Certiorari To the United States Circuit Court of Appeals For the Fourth Circuit

Virginia Electric and Power Company (hereinafter called the Company), prays that a writ of certiorari issue to review, to the extent stated below, the decree (S. R. 78)[1]

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[1] Pursuant to a stipulation of the parties (S. R. 79) the record for purposes of this petition (and for disposition on the merits if the writ be granted) consists of two volumes. The first is the printed Transcript of Record heretofore filed in this case in this Court *sub. nom. National Labor Relations Board, Petitioner* v. *Virginia Electric and Power Company* and *National Labor Relations Board, Petitioner* v. *The Independent Organization of Employees of Virginia Electric and Power Company*, October Term, 1941, Nos. 25 and 26. That is referred to herein as (R. .....). Only 7 copies of such printed Transcript of Record remain available, aside from those preserved in the permanent records of the Court. Such 7 copies are filed herewith. The stipulation further agrees, subject to this Court's approval, that there need be no reprinting of such Transcript of Record but that this petition (and the case if the writ be granted) may be submitted on such copies of the original printing as may remain available.

The second volume of the record consists (likewise pursuant to said stipulation) of the principal proceedings subsequent to such Transcript of Record, namely:

(a) The opinion of this Court in this case dated December 22, 1941 (S. R. 1);

(b) The order of the Board dated April 3, 1942,, vacating its order previously reviewed and prescribing further procedure (S. R. 11);

(c) The decision and order of the Board dated September 24, 1942 now sought to be reviewed (S. R. 13);

(d) The opinion of the United States Circuit Court of Appeals for the Fourth Circuit dated December 9, 1942 determining to enforce the order referred to in (c) (S. R. 62);

(e) The order of the United States Circuit Court of Appeals for the Fourth Circuit dated December 9, 1942 effectuating the opinion referred to in (d) (S. R. 78); and

(f) Said stipulation of the parties as to the record.

That volume is referred to herein as (S. R. .....).

There has been filed with the Clerk the entire original record certified and filed by the Board in the office of the clerk of the court below or otherwise on file in that office.

of the United States Circuit Court of Appeals for the Fourth Circuit entered on December 9, 1942, enforcing in its entirety an order (S. R. 59) of the National Labor Relations Board (hereinafter called the Board) against the Company. The question sought to be reviewed is one left undetermined by the Court when the case was reviewed on *certiorari* before.[2]

Opinions Below

The opinion of the Circuit Court of Appeals (S. R. 62) is not yet reported [except in 6 Labor Cases (C. C. H.) ¶ 61.357]. The decision and order of the Board (S. R. 13) is reported in 44 N. L. R. B. No. 75.[3]

Jurisdiction

The decree of the Circuit Court of Appeals was entered on December 9, 1942 (S. R. 78). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 and under Section 10 (e) and (f) of the National Labor Relations Act (hereinafter called the Act).

Questions Presented

1. Pursuant to individual assignments of employees (R. 843) and the provisions of an agreement of August 5, 1937 (R. 828) with a labor organization of employees known as The Independent Organization of Employees of Virginia Electric and Power Company (hereinafter called I. O. E.), the Company has semi-annually since that date deducted from wages amounts equal to dues in, and paid

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[2] S. R. 10; *National Labor Relations Board* v. *Virginia Electric & Power Company*, 1941, 314 U. S. 469, 480.

[3] This is a pamphlet copy of the decision and order issued in advance of the bound volume. It is available in the library of the Court.

such amounts to, the I. O. E. Such agreement also provided, at the instance of the employees and against the wishes of the Company, for a closed shop. The Board has sustained a complaint against the Company of "dominating and interfering with the formation and administration" of the I. O. E. and "contributing support to it" (S. R. 59); but there is no evidence, nor is there any claim, of any such conduct after the payment of the first installment of dues; and there is no evidence, nor is there any claim, that the I. O. E. has been other than independent since that time. The record shows many advantages obtained by the I. O. E. for its members, notably wage increases, overtime and arbitration. All dues paid to the I. O. E. have been used by it for its own purposes (maintenance of offices and meeting places, employment of counsel, etc.). Their aggregate now largely exceeds $45,000 (R. 843 and 442-3).

In such circumstances, may the Board, in ordering disestablishment of the I. O. E., require the Company to reimburse employees for all dues so checked off?

2. To the extent, if any, that may be pertinent to a review of 1. above, was there adequate evidence and basis in law to support the Board's finding of "dominating and interfering with the formation and administration" of the I.O. E. and "contributing support to it"?[4]

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[4] This question is presented only so far as may be pertinent to a reversal of the decree below to the extent that it enforces the dues reimbursement clause of the Board's order (paragraph (e) of section 2) (S. R. 61). It is not presented to procure a reversal of the decree below to the extent that it enforces the disestablishment requirement of the Board's order (paragraph (b) of Section 1 and paragraph (a) of Section 2) (S. R. 60). On December 14, 1942 the I. O. E. notified the Company that the I. O. E. had decided to dissolve without asking for a review of the decree below (certified supplemental record, vol. II, p. 53). On the same day the Board entered on order in its Case No. R-4571 (*In the Matter of Virginia Electric & Power Company and Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America, A. F. of L.*, 45 N. L. R. B. No. 183[3]) finding that the street car and bus operators (a part of the employees

Statute Involved

The pertinent provisions of the Act are set out in the Appendix.

Statement

On February 27, 1940 the Board entered a decision and order finding that the Company had violated Section 8(1, 2 and 3) of the Act and ordering disestablishment of the I. O .E., reimbursement of checked-off dues and certain other conduct (R. 952-980). On the petition of the Company the court below held that the Board's finding of domination was unsupported by evidence and that the other findings were also unsupported (R. 1006-19) and accordingly, on November 12, 1940, set aside the order in its entirety (R. 1019-20; 115 F. 2d 414).

The Board asked for certiorari on three questions, two of them being whether the Board's order of disestablishment was supported by evidence and whether the dues reimbursement requirement was within its power.[5] The validity of the dues reimbursement requirement, it was urged by the Solicitor General and General Counsel for the Board,[6] presented "a question of importance in the administration of the National Labor Relations Act." The writ was granted on March 31, 1941.

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of the Company and similarly a part of the members of the I. O. E.) constituted a separate bargaining unit, and directing that an election be held in such unit to determine its collective bargaining representative. On December 18, 1942 the Company posted a bulletin complying with the disestablishment requirement (certified supplemental record, vol. II, pp. 54, 58-62).

[5] Petition of the Board in *National Labor Relations Board* v. *Virginia Electric and Power Company*, October Term 1940, No. 758, pp. 3-4. The third question, not presently relevant, was whether a cease and desist order was supported by evidence (id., p. 4).

[6] Petition referred to in n. 4 above, at pp. 26 and 28-29.

On December 22, 1941 this Court delivered an opinion (S. R. 1, reported in 314 U. S. 469) reversing the decree below and remanding the cause to the Board "for a redetermination of the issues in the light of this opinion". This was apparently on the ground that the findings of the Board were defective, being based largely on the legally untenable premise that the words of a bulletin of April 26, 1937 and a speech of May 24, 1937 were in themselves coercive, so that in effect there was no action by the administrative agency, such action being, of course, a prerequisite to judicial review. The Court carefully added:

> "We do not mean to intimate any views of our own as to whether the Independent [I.O.E.] was dominated or suggest to the Board what its conclusion should be when it reconsiders the case. Since the Board rested the remainder of its order in large part on its findings with respect to domination of the Independent [I.O.E.], we do not at this time reach the other parts of the Board's order, including the command that the checked-off dues and assessments [sic] should be refunded" (S. R. 10, 314 U. S. at 480).

Upon remand, the Board, on the original record without further evidence, enlarged somewhat upon its original decision, by elaborating the form of its presentation and adding some insubstantial further incidents, but relying mainly, as before, on the tenor of those two communications. Upon such findings, the Board entered an order (S. R. 59), of like form with its predecessor of 1940.

Contrary to the rule that in such cases review begins again *de novo*,[7] the court below, when the matter was pre-

[7] *Ford Motor Co.* v. *N. L. R. B.*, 1939, 305 U. S. 364, 373-4, 376; *Securities and Exchange Commission* v. *Chenery Corporation*, S. Ct. Oct. Term 1942 No. 254, dec. Feb. 1, 1943, Supreme Court Service (C. C. H.), op. vol. pp. 537, 542, 546; 11 U. S. Law Week 4160, 4161, 4163; not yet otherwise reported.

sented to it again by petition of the Company, felt that the reversal of its original decree by this Court "precludes another holding that the identical evidence is insufficient" (S. R. 63), for the ruling of this Court had made it the law of the case that a disestablishment order could be entered by the Board on the original record. Even apart from that doctrine, the court below felt that there was a "clear intimation" in this Court's opinion that the evidence was sufficient for that purpose (S. R. 70). On those two grounds alone, without any consideration of the evidence,[8] the court below felt constrained to order enforcement of the disestablishment and re-employment provisions of the Board's order. In doing so, a majority of the court concluded that the dues reimbursement requirement was within the power of the Board (S. R. 71-76), Soper, C. J., dissenting (S. R. 76).

Thereafter the I. O. E. elected to dissolve and the Company published a bulletin complying, or stating a willingness to comply, with all provisions of the Board's order except the dues reimbursement requirement (see note 4 above).

Reasons for Granting the Writ

1. The question of the validity of the dues reimbursement requirement is of importance in the administration of the Act. In this belief counsel charged with responsibility for administration of the Act have concurred (see page 4 above). The question is one that has not been, but should be, settled by this Court.

2. The decision below sustaining the dues reimbursement requirement is the only decision sustaining such an order of the Board. In all other cases where the issue of the validity of such a requirement has been presented, the requirement has been held invalid as beyond the power of the

[8] Though with a polite bow to the reasonableness, as well as the authority, of this Court's opinion (S. R. 71).

Board. Ten decisions in five Circuits have so held.[9] The decision below is thus in conflict with the decisions in other Circuit Courts of Appeals on the same matter.

3. The decision below is probably in conflict with principles declared in decisions of this Court on different, though related, questions: *Consolidated Edison Co.* v. *N. L. R. B.*, 1938, 305 U. S. 197, 235-6; *Republic Steel Corporation* v. *N. L. R. B.*, 1940, 311 U. S. 7, 11-12; and *Phelps Dodge Company* v. *N. L. R. B.*, 1941, 313 U. S. 177, 198.

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[9] The cases are:

Second Circuit

Western Union Telegraph Co. v. *N. L. R. B.*, 1940, 113 F. (2d) 992
and
Corning Glass Works v. *N. L. R. B.*, 1941, 118 F. (2d) 625

Sixth Circuit

N. L. R. B. v. *West Kentucky Coal Co.*, 1940, 116 F (2d) 816; and
N. L. R. B v. *United States Truck Co.*, 1942, 124 F. (2d) 887

Seventh Circuit

N. L. R. B. v. *J. Greenebaum Tanning Co.*, 1940, 110 F. (2d) 984;
A. E. Staley Manufacturing Co. v. *N. L. R. B.*, 1940, 117 F. (2d) 868; and
Reliance Manufacturing Co. v. *N. L. R. B.*, 1942, 125 F. (2d) 311

Eighth Circuit

Kansas City Power & Light Co. v. *N. L. R. B.*, 1940, 111 F. (2d) 340; and
N. L. R. B. v. *Southwestern Greyhound Lines, Inc.*, 1942, 126 F. (2d) 883

Tenth Circuit

N. L. R. B. v. *Continental Oil Company*, 1941, 121 F. (2d) 120.

A closed shop clause, included expressly in the agreement or existing in fact by known policies of the employer, was involved in the first of the above cases in the Second Circuit (see 113 F. (2d) at 994), both of the above cases in the Sixth Circuit (see 116 F. (2d) at 820 and *In the Matter of United States Truck Co., Inc.*, 1939, 11 N. L. R. B. 706, 713), the first of the above cases from the Seventh Circuit (see 110 F. (2d) at 986) and the first of the above cases in the Eighth Circuit (see 111 F. (2d) at 343). So the closed shop requirement was before the court in every Circuit which has passed on the question except the Tenth. The different classification of these cases by the court below (S. R. 74) is erroneous.

holding that the Act does not give the Board "a punitive jurisdiction."

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

In order to avoid the expenditure of effort, materials and money that would be required to reprint the original Transcript of Record of over one thousand pages, it is respectfully moved that the order granting the writ, if entered, shall provide that the case may be submitted, so far as relates to the original Transcript of Record, on the printed copies thereof filed herewith, without any additional printing.

Respectfully submitted,

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Dated February 3, 1943.

Appendix

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. A., Sec. 151, *et seq.*):

* * * * *

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: PROVIDED, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a

condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

Prevention of Unfair Labor Practices

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *